STATE OF MICHIGAN

COURT OF APPEALS

GARY KULAK,

Plaintiff-Appellant,

v

CITY OF BIRMINGHAM, TOM MCDANIEL, RACKELINE HOFF, DIANNE M. MCKEON, SCOTT MOORE, and JULIE PLOTNIK,

Defendants-Appellees.

UNPUBLISHED
April 13, 2006

No. 258905
Oakland Circuit Court
LC No. 2004-057174-CZ

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants under MCR 2.116(C)(7), (8), and (10). This case arose out of defendants' removal of plaintiff from his position on the Birmingham Planning Board. We affirm.

A trial court's decision granting summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. Under MCR 2.116(C)(8), which tests the legal sufficiency of the claim, the "well-pleaded factual allegations are accepted as true," and the motion is only granted if the claims are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*., quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*., 119. Constitutional questions are also reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). Similarly, questions of statutory interpretation are reviewed de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

Plaintiff first argues that he was denied his rights to due process and to fair and just treatment under Const 1963, art 1, § 17. We find the trial court properly dismissed plaintiff's claims based on these allegations.

Const 1963, art 1, § 17 provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Plaintiff's life or liberty was not at stake, and his prior 42 USC 1983 action in federal district court, and affirmed on appeal, squarely decided that plaintiff had no property interest in his position on the planning board. Although the federal court did not explicitly address due process under the Michigan Constitution, "Michigan's due process guarantee is construed no more broadly than the federal guarantee." *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998). The determination that a public officer does not have a property interest in his position is the same under Michigan law as it is under federal law. Therefore, the trial court correctly held that plaintiff was collaterally estopped from relitigating whether he had a property interest in his position. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

In any event, plaintiff was given notice of the complaints against him, the nature of the proceedings, and an opportunity to be heard. It is undisputed that he received the original complaints on November 25, 2003, and the additional complaints on January 6, 2004. His response was due on January 21, 2004. He also had an opportunity to address all complaints at the January 26, 2004 public hearing. Plaintiff alleges, but fails to demonstrate, that the decisionmakers were biased against him. Thus, even if plaintiff had a property interest, he received the due process to which he was entitled. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 28-29; 703 NW2d 822 (2005).

Because this case involves an executive investigation into plaintiff's performance of his duties as a member of the planning board, it appears that plaintiff was entitled to "fair and just treatment" under Const 1963, art 1, § 17. However, other than unauthenticated pages from a local newspaper, plaintiff submitted no evidence tending to show that he was treated unfairly. The trial court properly dismissed his claim of unfair or unjust treatment under MCR 2.116(C)(10).

Plaintiff argues that the trial court erred in determining that he did not have a right to appeal his removal under Const 1963, art 6, § 28. We disagree.

Const 1963, art 6, § 28 states, in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the

> determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

The challenged decision must be judicial or quasi-judicial, and it must "affect private rights or licenses." See *Beechnau v Secretary of State*, 42 Mich App 328, 330; 201 NW2d 699 (1972) (board of canvassers' decision did not affect private rights or licenses, and was not appealable under Const 1963, art 6, § 28). It is undisputed that this case does not involve a license, and plaintiff is barred from relitigating whether he had a private right to his position. Therefore, the trial court correctly found that plaintiff failed to state a claim for violation of Const 1963, art 6, § 28.

Plaintiff next argues that ordinance 82-29, under which defendants decided to remove plaintiff, violates MCL 117.30 because it does not allow appeals. We disagree.

MCL 117.30 provides:

> *In all actions and prosecutions* arising under the charter and ordinances of the city the right of appeal to the circuit court of the county, or to a court having jurisdiction, *shall be allowed* to a party, and the same recognizance or bond shall be given as is or may be required by law in analogous cases on appeal from the court that tried the city charter or ordinance violation. [Emphasis added.]

Under MCR 2.101(A) and its predecessor, GCR 1963, 12, an "action" is a "civil action," i.e., a civil lawsuit. Black's Law Dictionary (8th ed) further explains:

> "An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment." 1 Morris M. Estee, Estee's Pleadings, Practice, and Forms § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885).
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> "The terms 'action' and 'suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as 'actions,' and of those in courts of equity as 'suits.' In olden time there was a more marked distinction, for an action was considered as terminating when judgment was rendered, the execution forming no part of it. A suit, on the other hand, included the execution. The word 'suit,' as used in the Judiciary Act of 1784 and later Federal statutes, applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him." Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure 3 (2d ed. 1899).

Clearly, sources older than the Home Rule City Act of 1909 define an "action" as a civil lawsuit. We decline to conclude that MCL 117.30 intended "action" to mean anything else. Plaintiff's removal was not an "action" brought under a city ordinance. Therefore, the trial court correctly concluded that plaintiff did not have a right to appeal under MCL 117.30.

Plaintiff argues that the Birmingham City Commission rendered meaningless the protections afforded by MCL 117.5 when they defined "cause" in ordinance 82-29 as an unreviewable discretionary decision. We disagree.

Ordinance 82-29, as amended, provides in pertinent part:

> (a) Members of the planning board may, after a public hearing, be removed for cause.
>
> (1) As used in this Section, the term "cause" is defined as a determination by the City Commission that a sufficient reason exists, as determined and defined by the City Commission in its sole discretion, for the removal of a member of the planning board. The decision by the City Commission to remove a member of the planning board shall be final and binding upon such member of the planning board and no appeal shall arise therefrom.

We also note that, before it was amended, ordinance 82-29 did not define cause, or indicate who was to determine whether cause existed, or whether the determination was appealable. In pertinent part, MCL 117.5(d) provides:

> *The term of a public official shall not be shortened* or extended beyond the period for which the official is elected or appointed, *unless he* or she *resigns or is removed for cause*, if the office is held for a fixed term. [Emphasis added.]

Statutes are to be construed consistently, if possible. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Municipalities "may not enact an ordinance that directly conflicts with the state statutory scheme." *AFSCME v Detroit*, 468 Mich 388, 411; 662 NW2d 695 (2003). However, MCL 117.5(d) also does not define cause, does not state who is to determine whether cause exists, and does not require that an appeal be provided. Therefore, there is no direct conflict between amended ordinance 82-29 and MCL 117.5(d).

Plaintiff nevertheless argues that the definition of "cause" in ordinance 82-29 permits defendants to remove a board member for arbitrary and discriminatory reasons, thereby contravening the purpose of MCL 117.5(d). We disagree.

Our Supreme Court has explained:

> When the right to remove can be exercised only for specific cause, or for cause generally, the appointing power cannot arbitrarily remove the officer, and, where the removal is to be had for cause, the power cannot be exercised until the officer has been duly notified and an opportunity has been given him to be heard in his own defense. [*Powell v Battle Creek*, 169 Mich 19, 29; 135 NW 79 (1912).]

Our Supreme Court further explained that removal for cause under the Home Rule City Act requires some direct connection between misconduct and the performance of official duties. *Wilson v Council of Highland Park*, 284 Mich 96, 97-98; 278 NW 778 (1938). Thus, where "[n]o misconduct in office, [and] no official misconduct, [wa]s shown or claimed," there was no "cause" justifying the plaintiff's removal. *Id*., 98. Similarly, this Court has held that:

> Black's Law Dictionary (6th ed), p 221 defines "cause" "[a]s a reason for an action." In a similar vein, we note that this Court has recently indicated that "good cause" generally means "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." [*Buchanan v City Council of Flint*, 231 Mich App 536, 544-545; 586 NW2d 573 (1998) (internal quotations and citations omitted).]

The allegations against plaintiff in this case implicate the performance of his duties as a member of the planning board and, therefore, would constitute "cause" for removal under any of these definitions. As amended, ordinance 82-29 defines "cause" as "a determination by the City Commission that a sufficient reason exists, as determined and defined by the City Commission in its sole discretion, for the removal of a member of the planning board." Contrary to plaintiff's argument, this definition is not inconsistent with the definitions adopted in *Powell*, *Buchanan*, and *Wilson*.

Further, as defendants argue, the city commission had the power to amend ordinance 82-29 as it did. In particular, Const 1963, art 7, § 22, provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. *Each such city* and village *shall have power to adopt* resolutions and *ordinances relating to its municipal concerns, property and government, subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

Additionally, Const 1963, art 7, § 34, provides:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

Plaintiff has failed to show that the amended ordinance conflicts with the statutory scheme of MCL 117.5(d), or that it is otherwise illegal or inconsistent with Michigan law. Further, contrary to plaintiff's argument, the fact that the ordinance does not provide for a direct appeal does not mean that the city commission can remove a board member for arbitrary or discriminatory reasons. Rather, any such decision would be actionable under the various state and federal civil rights laws. However, this Court will not consider plaintiff's hypothetical civil

rights arguments. *Lewis v Krogol*, 229 Mich App 483, 490-491; 582 NW2d 524 (1998). The trial court properly found that plaintiff failed to state a claim for a violation of MCL 117.5, where plaintiff failed to establish that defendant's reasons were arbitrary or discriminatory.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis